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Supreme Court, U.S.
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NO. 92-1257

In The Supreme Court of the United States

October Term, 1992

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRARY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, AND JOHN QUINCY ADAMS

APPELLANTS

VERSUS

KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL STATE OF MISSISSIPPI; DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI; MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS; AND THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; AND WALTER A. GRAHAM, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE MISSISSIPPI SENATE.

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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41 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction over this appeal under 28 U.S.C. § 1253 from an order of a three-judge district court which ruled solely on an attorneys' fee and cost motion and which does not grant or deny injuncitve relief?

2. Whether this Court lacks jurisdiction over this appeal under 42 U.S.C. § 1973c to review an order of a three-judge district court providing only for attorneys' fees and expenses and which does not terminate the case or grant or deny injunctive relief?

3. Whether an order of a three-judge district court awarding attoneys' fees and expenses but not terminating the case or granting or denying injunctive relief is a matter of such imperative public importance requiring immediate settlement by this Court so as to warrant the granting of certiorari before judgment in the court of appeals under 28 U.S.C. § 1254(1) and Supreme Court Rule 11?

4. Did the Three -judge district court abuse its discretion in ruling on the merits on the Appellants' attorneys' fees motion where pending motions remain in the case, no final judgment, was entered, and where there were imminent special legislative elections yet to be held pursuant to a prior order of that court?

5. Did the district court abuse its discretion in deciding Appellants' attorneys' fees motion without an evidentiary hearing in view of the "wealth of material" before the court?

6. Did the district court abuse its discretion in awarding Appellants $198,688.23 in attorneys' fees and expenses?

7. Whether the district court has denied an award of post-judgment interest under 28 U.S.C. § 1961(a) since a judgment on a separate document has yet to be entered under Fed. R. Civ. P. 54 (a) & 58?

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NO. 92-1257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HOLLIS WATKINS, ET AL.
Appellants

v.

KIRK FORDICE, GOVERNOR
OF MISSISSIPPI, ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the Appellees move to dismiss this appeal or, alternatively, to affirm the order of the three-judge district court below. This motion is based on the grounds that (1) this Court lacks jurisdiction; (2) that the case does not warrant this Court treating appellants' jurisdictional statement as a petition for writ of certiorari prior to judgment

in the court of appeals; and (3) the decision of the district court is eminently correct so as to warrant no further review.

STATEMENT OF THE CASE

On October 29, 1992, the United States District Court for the Southern District of Mississippi, sitting as a three-judge court to resolve a challenge to Mississippi's legislative reapportionment based on the 1990 census, entered an attorney's fee order awarding the Appellants $198,688.23 against the State of Mississippi in attorney's fees and costs. This award was made notwithstanding the district court's conclusion that the Appellants obtained no relief from the Court and that the lawsuit had not prompted the Mississippi Legislature to enact reapportionment legislation since such was required by Mississippi law. ***Watkins v. Fordice***, 807 F. Supp. 406, 411 (S.D. Miss. 1992) (three-judge court) (J.S. App. 6a).

This lawsuit was filed on June 28, 1991. Two years prior to the commencement of this action, the Mississippi Legislature initiated its reapportionment activity by postponing the regular August, 1991 primary elections to September and October, 1991. This legislative action was taken in anticipation of legislative and county elections being con-

ducted in the same year as the release of the 1990 census results. A postponement of the regular August primary dates was deemed necessary to enable both the legislature and the counties to redistrict in 1991, obtain federal preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and to hold elections that year. On June 28, 1989 the Attorney General of the United States precleared under Section 5 the change in the election schedule. MISS. CODE ANN. § 23-15-191 (Revised 1990).

The State of Mississippi received the 1990 decennial census data on January 31, 1991. After a series of public hearings throughout the State of Mississippi, the Mississippi Legislature on April 30, 1991 adopted reapportionment plans for the House and Senate. On May 10, 1991 the United States Attorney General received for review under Section 5 of the Voting Rights Act the 1991 legislative reapportionment plans, and on July 2, 1991 he interposed an objection. *Watkins v. Mabus*, 771 F. Supp. 789, 792 (S.D. Miss. 1991)(three-judge court).

On June 28, 1991, between the date of the submission of the plans to the Attorney General of the United States and

the date of his objection, the Appellants filed this action in the district court challenging Mississippi's then current legislative apportionment (1982 plan), as well as the 1991 plan. Appellants sought injunctive and other relief under Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 & 1973c, and the Fourteenth and Fifteenth Amendments to the United States Constitution. 771 F. Supp. at 791-792.

After a hearing on July 15, 1991, the district court, by order of that date and without opposition from the appellee members of the State Board of Election Commissioners, enjoined the July 19, 1991 legislative qualifying deadline. The district court also requested recommendations for special master or court experts and directed the parties to file their proposed plans on or before July 22, 1991. A hearing was set for July 29, 1991. *Id.* at 793.

A hearing was held between July 29, 1991 and August 1, 1991, after which the court concluded that none of the submitted plans could be used for the 1991 legislative elections. *Id.* at 794-97, 800. The court also found that insufficient time remained to enable it to fashion a plan of its own and, therefore, by order dated August 2, 1991, ordered that in-

terim 1991 legislative elections be held under the 1982 plan. *id.* at 797, 799. Appellants requested the district court to stay the 1991 legislative elections, and this request was denied by order dated August 8, 1991. *Id.* at 791.

On August 9, 1991, Appellants applied to this Court for an injunction and stay pending appeal. Appellants had filed their notice of appeal on August 6, 1991. On August 12, 1991 Appellants filed a supplement to their application for injunction and stay pending appeal. On August 20, 1991, this Court, on the referral of the application by Justice Scalia, denied the application for stay. ***Watkins v. Mabus***, ___ U.S. ___, 112 S. Ct. 17 (1991).

On August 26, 1991, Appellants moved the district court for a preliminary injunction under Section 5 of the Voting Rights Act to enjoin its enforcement of its August 2, 1991 order scheduling the 1991 legislative elections, contending that the order contained new procedures for the elections which had not been precleared under Section 5. On August 30, 1991, the district court denied Appellants' request for a preliminary injunction, concluding that new temporary election procedures for the conduct of the 1991 legislative elections were necessary court ordered changes which did

not reflect policy choices of elected representatives. On September 9, 1991, Appellants filed an amended notice of appeal to this Court. On September 13, 1991, Appellants filed a jurisdictional statement with this Court in ***Watkins v. Mabus***, No. 91-434, and on September 14, 1991 applied to this Court for another injunction and stay pending appeal. On September 16, 1991, Justice Scalia denied Appellants' application for injunction and stay pending appeal.

On October 14, 1991, the appellee members of the State Board of Election Commissioners filed a motion to dismiss or affirm with this Court in ***Watkins v. Mabus***, No. 91-434, and on November 12, 1991, this Court summarily affirmed the orders of the district court, with the exception of vacating the order in part as to election procedures since Appellants' claims were rendered moot by the completion of the September 17, 1991 election. ***Watkins v. Mabus***, ___ U.S. ___, 112 S. Ct. 421 (1991).

The Mississippi Legislature, during the 1992 Regular Session, adopted new plans for the House and Senate (J.R. 1, 202, Mississippi Legislature 1992 Regular Session), incorporating changes in response to the July 2, 1991 objection letter of the Attorney General of the United States. The 1992

reapportionment plans were submitted to the Attorney General of the United States and were precleared by letter dated March 30, 1992, except for three (3) Senate districts. In response to the objection of the Attorney General to the three Senate districts, a new Senate plan was adopted, J.R. 204, which the Attorney General of the United States precleared under Section 5 on May 8, 1992. ***Watkins v. Fordice***, 791 F. Supp. 646, 647 (S.D. Miss. 1992) (three-judge court).

On April 28, 1992, ten (10) days before the final preclearance date, the appellee members of the State Board of Election Commissioners had moved the district court to order immediate and permanent legislative elections for all those districts in Joint Resolutions 1 and 202 that were precleared and to draw temporary districts for Senate Districts 37, 38 and 39, and to order temporary elections in Senate Districts 37, 38 and 39. On that same date the Appellants moved for preliminary and permanent injunctions and for injunctive and declaratory relief setting aside the results and certification of the 1991 election and scheduling legislative elections for late 1992. On May 21, 1992, the district court *sua sponte* entered an opinion and order scheduling special legislative primary elections to be held on

August 4, 1992, with any runoff elections to be held on August 25, 1992. 791 F. Supp. at 649. The court scheduled the general election for November 3, 1992 to coincide with the national presidential and congressional election. *Id.* The district court concluded that the preclearance of both plans (House and Senate) mooted most of the pending motions. *Id.* at 648. The court directed the movants to notify the court as to those motions they desired to be considered and to withdraw the remainder motions. *Id.* at 649. On May 22, 1992, the appellee members of the Mississippi State Board of Election Commissioners promptly withdrew their motion of April 28, 1992 requesting the court to schedule legislative elections, since the court's sua sponte order of May 21, 1991 mooted Appellees' motion (J.S. No. 92-1295 App. 48). Appellants to this date have not complied with the district court's direction, as found by the district court in its order awarding attorney's fees. 807 F. Supp. at 409-10, (J.S. App. 3a).

Appellants moved the three-judge district court to dissolve and to remand the case to the managing district judge for an award of attorney's fees and expenses, after

discovery and an evidentiary hearing on the attorney's fees issues. Appellants requested fees in the amount of $805,659.10 for 2728.8 hours of work claimed by their seven attorneys and reimbursement for expenses claimed in the amount of $61,279.29. Appellants sought a premium hourly rate for the work performed in this case, or alternatively, an enhancement of the lodestar. Appellees filed a joint response opposing the motions. Appellees argued that the three-judge district court should not be dissolved since elections scheduled by the three-judge court were still being conducted and because Appellants had not yet complied with the district court's order concerning identification of motions which were to be considered or which would be withdrawn. Appellees also challenged Appellants' status as prevailing parties in the litigation and challenged the reasonableness of the time, hourly rates and expenses claimed by Appellants. Appellants filed a lengthy reply in support of their motions.

Through its memorandum opinion and order entered on October 29, 1992, 807 F. Supp. at 406, (J.S. App. 2a), the three-judge district court denied Appellants' motion to remand to the managing judge and the requests to engage in discovery and to have an evidentiary hearing on the attor-

ney's fees. The three-judge court awarded Appellants $198,688.23 in attorney's fees and expenses.

Appellants filed a timely notice of appeal on November 25, 1992, simultaneously appealing to this Court, as well as the United States Court of Appeals for the Fifth Circuit. By separate notices filed on November 30 and December 1, 1992, Appellees filed separate simultaneous appeals from the order to both this Court as well as the Fifth Circuit.

ARGUMENT

I. THIS COURT SHOULD DISMISS APPELLANTS' APPEAL

A. Because The Three-Judge District Court's Order Awarding Appellants Attorney's Fees Did Not Include A Grant Or Denial Of Interlocutory Or Permanent Injunctive Relief, This Court Lacks Jurisdiction To Entertain This Appeal Under 28 U.S.C. § 1253.

Appellants claim that this Court has direct appellate jurisdiction under 28 U.S.C. § 1253 to review the order of the three-judge district court providing solely for an award of attorney's fees. 28 U.S.C. § 1253 reads in its entirety as

follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

This statutory provision, on its face, is inapplicable to an order awarding attorney's fees and costs. An award of attorney's fees is not an interlocutory or permanent injunction. As this Court observed in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), an award of attorney's fees is a collateral matter "uniquely separable from the cause of action to be proved at trial." *Id.* at 452.

This Court has previously addressed the issue of whether it has jurisdiction under 28 U.S.C. § 1253 over an independent appeal of an award of attorney's fees. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n. 16 (1980), this Court concluded "we would not have appellate jurisdiction under 28 U.S.C. § 1253 to decide the

attorney's fees question had it alone been appealed alone." In that case the Court took jurisdiction under 28 U.S.C. § 1253 since the order appealed from also granted injunctive relief. In finding jurisdiction over the attorney's fees question, the Court relied upon the "whole case" doctrine. *Id.* at 737 n. 16.

The narrowness of this Court's jurisdiction under § 1253 is reflected in the decision of this Court in ***MTM, Inc. v. Baxley***, 420 U.S. 799 (1975), where this Court held:

> [A] direct appeal will lie to this Court under § 1253 from an order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.
>
> *Id.* at 804.

The order appealed from in the instant case involves no grant or denial of injunctive relief and does not rest upon the resolution of the merits of Appellants' constitutional claim presented below.

Dismissal of Appellants' appeal under 28 U.S.C. § 1253 for lack of jurisdiction is consistent with this Court's expressed concern over the need to avoid mandatory jurisdiction over collateral matters such as attorney's fees. In *Heckler v. Edwards*, 465 U.S. 870, 884-85 (1984), this Court examined the scope of appeals under former 28 U.S.C. § 1252 (Repealed 1988)[1], a former basis of mandatory jurisdiction, and there stated:

> A construction of § 1252 that would require us to review collateral issues coming to us as independent matters...would undermine the effectiveness of the direct appeal provision....[T]his Court would be required to give precedence to issues outside the congressional definition of public importance. We could, for example, be obliged to crowd our docket with appeals concerned solely with *attorneys' fees awards* or pendent claims arising under state law.
>
> *Id.* at 884-85 (emphasis added).

In *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90 (1974), this Court concluded that "only a narrow

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[1] Section 1252 was repealed in 1988. Act of June 27, 1988, 100th Cong., 2d Sess., Pub. L. 100-352, § 1, 102 Stat. 662.

construction [of § 1253] is consonant with the overriding policy historically encouraged by Congress of minimizing the mandatory docket of this Court in the interest of sound judicial administration." *Id.* at 98 (footnote omitted).

In a recent appeal of an attorney's fee award by a three-judge district court in a state legislative reapportionment case, this Court in *Clinton v. Jeffers*, ___ U.S. ___, 112 S. Ct. 1462 (1992), summarily vacated the judgment and remanded the case to the district court with instructions to enter a fresh judgment to enable an appeal to the United States Court of Appeals for the Eighth Circuit. The appellants in *Clinton*, unlike the Appellants in the instant case, had not taken a protective appeal to the Court of Appeals.

Here the order appealed from provided only for attorney's fees. The Appellants have filed an appeal to the Fifth Circuit (J.S. App. 69a-70a). Accordingly, this Court should dismiss Appellants' appeal under 28 U.S.C. § 1253 for lack of jurisdiction.

B. 42 U.S.C. § 1973c Does Not Provide An Independent Jurisdictional Basis For Direct Appellate Review Of Orders Providing Only For Attorney's Fees.

As an alternate independent basis of jurisdiction, Appellants claim that this Court has direct appellate jurisdiction over the attorney's fees award pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which provides in pertinent part:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28, and any appeals shall lie to the Supreme Court.

In *NAACP v. New York*, 413 U.S. 345 (1973), this Court held that a direct appeal would lie to the Supreme Court from an order denying intervention in a suit under § 4(a) of the Voting Rights Act of 1965, where the district court's order terminated the case by granting the State of New York's motion for summary judgment. The Court concluded that the words "any appeal" in § 4(a), which language is also found in § 5 of the Act, "could be said to include review

of any meaningful determination made in the progress of the § 4 lawsuit." *Id.* at 343-344. The Court determined that the broad meaning of "any appeal" was consistent with the congressional desire to remove as quickly as possible voting restraints on account of race or color. *Id.* at 354.

However, in ***Mississippi v. Smith***, 461 U.S. 912 (1983), this Court summarily dismissed for lack of jurisdiction an appeal based on § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. In that case the State of Mississippi sought a direct appeal to this Court under § 5 from a decision of a District of Columbia three-judge district court denying the State of Mississippi's motion for partial summary judgment and motion in limine in a §5 preclearance action. ***Mississippi v. Smith***, 541 F. Supp. 1329 (D.D.C 1982).

In the instant case the attorney's fees order cannot properly be characterized as a meaningful determination made in the progress of the § 5 lawsuit. The three-judge district court had been convened under 28 U.S.C. § 2284(a)

to consider appellants' claims challenging the constitutionality of the apportionment of the Mississippi Legislature. Appellants also invoked the three-judge district court's jurisdiction under § 5 of the Voting Rights Act t enjoin the enforcement of the 1991 legislative reapportionment resolutions, since such resolutions had not been precleared under § 5. In this context the district court held as follows:

> As the parties recognize, *the 1991 plan is not in issue*; because it has not been precleared, it has no effect. 42 U.S.C. § 1973c. This was, among other things, recognized by the resolutions adopting the 1991 plan. Miss. J.R. No. 4 at p. 27 (1991) and Miss. J.R. No. 202 at p. 19 (1991).

771 F. Supp. 789 at 798 (emphasis added).

The State of Mississippi made no attempt to enforce the unprecleared resolutions, which on their face did not take effect until they were precleared. Therefore, the district court had no occasion to exercise its § 5 jurisdiction. A three-judge district court under § 5 of the Voting Rights Act of 1965 has very limited jurisdiction when sitting as a § 5 "coverage"

court. It can only decide whether a change with respect to voting is subject to § 5 and, if so, whether that change has been precleared and, if not, what is the appropriate remedy. *City of Lockhart v. United States*, 460 U.S. 125, 134-135 (1983). When the three-judge district court made its determination of the attorney's fees issue, it was clearly exercising its jurisdiction retained under 28 U.S.C. § 2284(a), and it was not functioning as a § 5 "coverage" court under 42 U.S.C. § 1973c. Accordingly, 42 U.S.C. § 1973c cannot serve as a basis of Appellants' appeal from the order of the three-judge district court providing only for an award of attorney's fees. Therefore, this Court should dismiss Appellants' appeal under 42 U.S.C. § 1973c for lack of jurisdiction.

C. Appellants' Alternate Request That This Court Treat Their Jurisdictional Statement As A Petition For Writ Of Certiorari, Prior To Judgment In The Court Of Appeals, Fails To Comply With Rule 11 Of This Court.

Appellants request that this Court treat their Jurisdictional Statement as a petition for writ of certiorari, prior to

judgment in the court of appeals, if this Court should conclude that it lacks jurisdiction of their appeal. Appellants' Jurisdictional Statement fails to comply with Rule 11 of the Rules of this Court and should not be treated as a petition for writ of certiorari before judgment in the court of appeals. Rule 11 of the Rules of this Court provides as follows:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. § 2101(e).

SUP. CT. R. 11 (emphasis added).

Appellants' jurisdictional statement makes no attempt to demonstrate that the requested review of the attorney's fees order "is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate settlement in this Court." SUP. CT. R. 11 (empahsis added). The obvious reason for Appellants' failure to comply with Rule 11 is that no such showing could con-

ceivably be made in connection with a requested review of an order providing only for attorney's fees.

This Court's power to grant certiorari prior to judgment under 28 U.S.C. § 2101(e) is sparingly used and is essentially exercised "because the issues presented are of great significance and demand prompt resolution..." ***Dames & Moore v. Regan***, 453 U.S. 654, 668 (1981). In ***U.S. v. Nixon***, 418 U.S. 683 (1974), this Court granted certiorari prior to judgment of the United States Court of Appeals for the District of Columbia Circuit to consider President Richard M. Nixon's claims of absolute executive privilege in response to a subpoena seeking production of presidential tapes. Review was granted under 28 U.S.C. § 2101(e) "because of the public importance of the issues presented and the need for their prompt resolution." *Id.* at 686-687. *See also* ***Wilson v. Girard***, 354 U.S. 524 (1957) (a case involving the delivery of a United States soldier to Japanese authorities for criminal trial); ***U.S. v. United Mine Workers***, 330 U.S. 258 (1947) (a case

involving a nationwide coal strike where the mines were in government possession under a seizure order); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (a case involving the validity of the Bituminous Coal Conservation Act of 1935).

The instant case simply does not warrant a dramatic departure from normal appellate practice.

Moreover, Appellants noticed their appeal from the order awarding attorney's fees while other motions were still pending and without any final judgment being entered in the district court. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), this Court, quoting *Catlin v. United States*, 324 U.S. 229 (1945), held a decision is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The attorney's fees order is not an executable final judgment. Accordingly, since this Court's jurisdiction under 28 U.S.C. § 2101(e) is derivative of the court of appeals' jurisdiction under 28 U.S.C. § 1291, this Court also lacks jurisdiction under 28 U.S.C. § 2101(e) since

no final judgment was entered in the district court.

For all of the above reasons, the Court should dismiss Appellants' appeal or alternate petition for writ of certiorari prior to judgment in the court of appeals for lack of jurisdiction. Also, certiorari under 28 U.S.C. § 2101(e) should be denied for failure to comply with SUP. CT. R. 11.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S ORDER.

In the event that the Court determines that it has jurisdiction over this appeal, then the Appellees respectfully submit, in the alternative and without waiving their contention that this Court should reverse the district court's order on the grounds asserted in their separate pending Jurisdictional Statement in ***Fordice v. Watkins***, No. 92-1295, that the questions presented by Appellants are not substantial. Accordingly, this Court should summarily affirm the district court's Memorandum Opinion and Order on Appellants' appeal.

A. The Three-Judge District Court Properly Ruled On The Merits of Appellants' Attorneys' Fees Motion Because Pending Motions Remained In The Case, No Final Judgment Was Entered, And The Court Enjoyed Discretion To Entertain Such A Motion.

It is axiomatic that if there is a claim in a case that must be heard by a three-judge court, the three-judge court has the power to decide other claims in the case that standing alone would require only a single judge. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 504, n. 5 (1972); 17 *Wright, Miller & Cooper*, Fed. Prac. & Proc., Jur. 2d § 4235, at 624 (1988). The three-judge district court below followed that axiom by addressing the merits of Appellants' attorneys' fees motion and refusing to dissolve itself. 807 F. Supp. at 410 (J.S. App. 4a).

The district court's refusal to dissolve itself was not an abuse of discretion, given the fact that there remained other motions pending before the district court, the district court had not entered a final judgment in the case, and indeed there

were impending legislative elections ordered by the district court which were to occur on November 2, 1992. All these reasons counselled in favor of the three-judge court remaining convened. Therefore, this issue is plainly insubstantial and does not merit plenary consideration by this Court.

B. The District Court Did Not Abuse Its Discretion In Deciding Appellants' Attorneys' Fees Motion Based On The "Wealth of Material" Before It Without An Evidentiary Hearing.

This Court has repeatedly noted that an attorneys' fees request should not result in second major litigation. *E.g.*, *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638, 2643 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The district court explicitly noted this point. 807 F. Supp. at 415 (J.S. App. 14a). Appellants' contention here that they were entitled to an evidentiary hearing before the district court, if sustained by this Court, would produce just such a result.

As the district court noted, the parties provided it with a "wealth of material." 807 F. Supp. at 415 (J.S. App. 14a).

These materials included the affidavits of several attorneys, the results of a 1989 membership survey of the Mississippi Bar, and several bills of private counsel employed by state agencies in this and other litigation.

This Court's decision in *Blum v. Stenson*, 465 U.S. 886, 892-93 (1984), does not compel an evidentiary hearing on the facts of this case. In *Blum*, this Court held that the petitioner there had failed to submit any evidence challenging the accuracy and reasonableness of the hours charged by the respondents and therefore had "waived its right to an evidentiary hearing in the District Court. *See City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 472-473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award)." 465 U.S. at 892-93 n.5. This passage does not, as Appellants erroneously argue, establish a requirement of an evidentiary hearing on every contested attorneys' fees motion.

The district court here (composed as it is of 3 judges who were experienced trial lawyers) carefully reviewed the parties' extensive evidentiary materials and memoranda and assessed the fee which in its good judgment was reasonable in the circumstances of the case. *See* ***Blanchard v. Bergeron***, 489 U.S. 87, 96 (1989).

The district court did not abuse its discretion in failing to grant an evidentiary hearing, and this point does not merit plenary review by this Court.

C. The District Court's Award Of Attorneys' Fees Was Not Unreasonably Low.

Appellants complain that the amount awarded by the district court was unreasonably low because the district court failed to consider properly the results obtained and because it awarded lower hourly rates than those sought by Appellants. J.S. 9-11. This complaint is not substantial and certainly does not warrant plenary review by this Court. *See* ***Farrar v. Hobby***, ___ U.S. ___, 113 S. Ct. 566, 580 (1992).

(White, Blackmun, Stevens & Souter, JJ., concurring in part and dissenting in part) ("Estimating what specific amount would be reasonable in this particular situation is not a matter of general importance on which our guidance is needed.").

The district court explicitly considered and rejected an enhancement for the Appellants' claimed exceptional level of success. The district court stated in pertinent part:

> Plaintiffs suggest that another basis for awarding an enhanced fee is the exceptional level of success they attained. The court cannot conclude that such an enhancement would be appropriate in this case. While the court is persuaded that plaintiffs' efforts contributed to the legislature's redistricting plans for the State, and attained their goal of establishing the maximum number of majority black districts, the court attributes plaintiffs' success to the time expended toward achieving their goal, and has accounted for their success in the computation of hours for which they will receive compensation.

807 F. Supp. at 417 (J.S. App. 18a). The court went on to note that the plaintiffs' level of success in the district court was

quite low. *Id.* at n.22. Thus, the district court's rejection of an exceptional success enhancement was consistent with this Court's teaching that "[b]ecause acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." ***Blum v. Stenson***, 465 U.S. at 886 (footnote omitted).

The hourly rates awarded by the district court ($110 for Messrs. Rhodes and Walker and $95 for appellants' five other counsel, 807 F. Supp. at 415 (J.S. App. 15a)) were clearly within the range of rates before the district court ($70-200, 807 F. Supp. at 415-16 (J.S. App. at 14a-16a)), and do not demonstrate a failure by the district court to consider the results of this litigation. Thus, this issue is not substantial.

D. Because No Judgment Has Been Entered, The District Court Has Not Yet Denied An Award Of Postjudgment Interest.

The federal statute dealing with interest states in pertinent part:

> Interest shall be allowed on any money *judgment* in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the *judgment*, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of *judgment*. . . .

28 U.S.C. § 1961(a). This Court has held that postjudgment interest properly runs from the date of the entry of judgment. ***Kaiser Aluminum & Chemical Corp. v. Bonjorno***, 494 U.S. 827, 835 (1990).

Here, the district court entered a memorandum opinion and order on attorneys' fees and costs which does not mention interest. However, the district court did not enter a judgment, as defined by Fed. R. Civ. P. 54(a), on a separate document as required by Fed. R. Civ. P. 58. Therefore, entry of judgment, the event which would trigger the running of postjudgment interest under 28 U.S.C. § 1961(a), has not yet occurred, and the district court has not yet denied interest.

Accordingly, Appellants' complaint about interest not having been awarded is premature and does not merit plenary review by this Court.

CONCLUSION

For these reasons the appeal should be dismissed for lack of jurisdiction; alternatively certiorari should be denied; alternatively this Court should summarily affirm the order of the United States District Court for the Southern District of Mississippi.

Respectfully submitted,
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